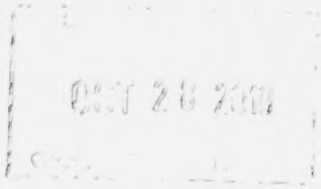

Case No. 09-1558

IN THE SUPREME COURT OF THE UNITED STATES

LORENE YOUNG
Petitioner,

v.

CARGILL
Respondent.

ON PETITION FOR A WRIT OF CERTIORAI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR RECONSIDERATION/REHEARING

Marcia Vestylena Forsett
11 Elkhorn Drive
Frostproof, FL 33843
863-605-5359
marciaforsett@msn.com
Attorney for Petitioner

QUESTIONS PRESENTED

WILL THE UNITED STATES FILE ADDITIONAL CHARGES AGAINST CARGILL FOR VARIOUS OTHER ENVIRONMENTAL VIOLATIONS?

DOES CARGILL EMPLOY UNDOCUMENTED WORKERS PURPOSELY TOAVOID EMPLOYER LIABILITY, THUSLY DEMONSTRATING A SYSTEMATIC PATTER OF ABUSE TOWARDS ITS WOKERS INJURED AT ITS PROCESSING PLANTS?

IS CARGILL'S SYSTEMATIC AVOIDANCEE OF RESPONSIBILITY A FORM OF CONTEMPT OF THE LAW?

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Dated December 17,2001
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no.09-2048 the United States Court of
Appeals for the First Circuit .
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Third District Court of Appeal for the
State of Florida.

PETITION FOR REHEARING

Petitioner respectfully requests that this court grant rehearing/reconsideration of its order dated October 4, 2010, which denied certiorari, and that the Court now grant certiorari.

INTRODUCTION

On December 29, 2001, at approximately 7 a.m., Ms. Lorene Young was injured in an anhydrous ammonia gas explosion at Cargill's citrus processing plant in Avon Park, Fl. More than thirty employees, largely Hispanic, were taken to local hospitals in the area for treatment. Anhydrous ammonia, in use for refrigeration, was stored in large ammonia receivers and piped throughout the plant.[1] After the accident, top plant officials met to discuss an action plan to eliminate ammonia relief valves from relieving at ground level. According to handwritten notes of a meeting held with administrators Ray Spurlock (Maintenance Manager),

[1] See appendix A exhibit labeled CAR00121

Larry Hadden (Environmental Health and Safety Manager), Mike Loudermilk (Safety Supervisor), Mike Maloney (Citrus Force-Safety Supervisor), Bill Brey (Director of Operations), Hiram Saylor (Refrigeration Maintenance), and Gary Cutral (Citrus Force-Supervisor), a suction valve had been closed prior to the accident. They discussed the valve's similarity to a water hose valve and how it could have closed inadvertently. When the evaporator's operator turned off the essence units, the relief valve immediately closed. With nowhere to escape, pressure built up inside the pipes and triggered the release of ammonia by the relief valve.

The notes from the meeting indicate that the relief valve was vented to the atmosphere at ground level.[2] The design of the relief valve vent should have been piped at a higher elevation. Also, according to other documents, the weather was such that the conditions were ideal for *keeping* ammonia vapors down at the ground level.[3]

[2] See Appendix B exhibit labeled CAR00026

[3] See Appendix C for exhibit CAR 00063

The hand written notes also indicate that the warning system was inadequate and discussed another facility's warning system, Citrus Suco which had an ammonia spill on December 13,2001.[4]

> OSHA issued a citation on June 27, 2002 that included reference to the December 29, 2001 accident and states in part: The employer did not conduct refrigeration process to address *at a minimum* the following: The hazards of the process; Engineering and administrative controls applicable to the hazards and their interrelationships such as appropriate application of detection methodologies for early warning of releases; consequences of failure of engineering and administrative controls; facility siting; human factors; a qualitative evaluation of a range of the possible safety and health effects of failure of controls on employees. [5]

[4] See Appendix E for article from Lakeland Ledger Dated December 17, 2001.

[5] See Appendix D Exhibit CAR00034

(emphasis added).

An Incident Investigation Report also indicated that some of the basic causes contributing to the accident were the engineering design and maintenance of the suction valve.[6]

REASONS FOR GRANTING REHEARING/RECONSIDERATION.

A petition for rehearing upon denial of a petition for certiorari is permitted when limited to "...intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented." Rule 44.2, Rules of the Supreme Court.

Since denial of Mrs. Youngs' writ the following intervening and controlling cases were decided.

On October 8, 2010, the United States Court of Appeals for the First Circuit rendered a decision in **Bielunos v. Misty Dawn Inc.** no.09-2048 and a copy of the opinion is annexed hereto.

[6] See Appendix E Exhibit CAR00066

This case is comparable to the present case in all material respects except for its opposite result. Bielunas was working as a commercial fisherman on the F/V SEA WATCHER I when his right foot was crushed in a ghastly accident. An orthopedic surgeon said it looked like someone had taken a sledgehammer to Bielunas's foot. His livelihood lost, Bielunas later sued the vessel's owner, F/V Misty Dawn, Inc., charging Jones Act negligence, ship unseaworthiness, and a right to maintenance and cure. A jury returned a verdict in Bielunas's favor, and the district judge entered judgment against Misty Dawn for $2,307,690. To make the venture as profitable as possible, Misty Dawn stored clam cages on the walkways. With the walkways blocked, crew members looking to traverse the ship had to sidle along a thin, unguarded ledge overlooking a nine-foot drop into the cargo hold or amble over a conveyor belt.
The court stated there is no mathematical formula for determining the monetary equivalent of non-economic injuries. Quoting ,Limone v. United States, 579 F.3d 79, 105 (1st Cir.2009).

The court also stated that the facts, measured under the legal criteria outlined above, support the district judge's decision not to pare down the award.

Also after writ was denied in the present case, on October 16, 2010, the Third District Court of Appeals for the State of Florida rendered a decision in **Barnett v Bank of America** No.3D09-1326

> In 2002, the plaintiff in this case was the manager at Bank of America's Bay Harbor Island branch. The bank was a tenant on the first floor of a building at 1108 Kane Concourse. The landlord decided to renovate the building, and Bank of America agreed to construct a new banking facility on the first floor.
> Bank of America wished to keep its branch open during the renovations. It constructed a temporary banking center occupying part of its preexisting space. The bank employees were moved into that space in May or June of 2002.

The plans called for a one-hour rated fire wall to be built from floor to ceiling which would separate the temporary banking center from the construction area. According to the testimony of the plaintiff as well as two other employees, the wall was not built in accordance with the plans, did not run up to the ceiling, and did not completely separate the temporary banking center from the construction area.

According to the depositions, the opening between the construction area and the temporary banking center allowed a constant influx of dust, odors, and fumes.

Each day the computers and tables were covered by a thick layer of dust, including concrete dust and fiberglass particles. The employees were breathing dust and fumes from glue, paints and paint thinners. There was no operable air conditioning system.

According to the depositions, within several weeks the plaintiff and other employees started becoming ill from this exposure with asthma, bronchitis, sinus problems, nose bleeds, headaches, and dermatitis. (Since the accident in the present case, Ms. Young has suffered from asthmatic bronchitis and nose bleeds.) Eight of the twelve employees made claims for health problems.

According to the deposition testimony, the plaintiff and other employees contacted executives from Bank of America to complain. The plaintiff, as manager, requested that the employees be moved to another location or that the bank bring a trailer to the site to house the temporary bank facility. The executives refused these requests because the branch had a safe deposit area which the bank wanted to keep open for its customers. The plaintiff was ordered to keep her employees working at the existing site.

Eventually the bank brought in fans and a cleaning crew. After employees began making workers' compensation claims, the bank also brought in air purifiers and coolers. The employees, however, kept getting sick. In December 2002, the bank temporarily closed the facility but then reopened it. Finally in January 2003, the bank shut down the temporary center and moved the employees to another site. The plaintiff brought suit against the bank and other defendants for injuries she sustained. The bank moved for summary judgment on the basis of workers' compensation immunity. The bank maintained that the firewall separating the construction area from the temporary bank facility reached all the way to the ceiling, and not partway as the employees testified. The bank argued that it prepared its plans using qualified design professionals and pulled the appropriate building permits.

> The bank denied that any of the air from the construction area entered the bank's temporary facility. The bank argued that it responded properly to the employee complaints and that as of December 2002, interior air testing revealed that the air quality in the building was within a normal range.

The court concluded that the employer "engaged in conduct which was substantially certain to result in injury or death." This case questioned "whether a reasonable person would understand that the employers conduct was 'substantially certain' to result in injury or death to the employee." Under this approach, the employers actual intent is not controlling.

Evidence of the relief valve's dangerous location (in the instant case) is currently an unaddressed issue of material fact relevant to the intentional tort exception to Florida's Workers Compensation employer immunity clause.

The intentional tort exception applies if the employer **engaged in conduct that a reasonable person would view as "substantially certain to result in *injury or death*."** *Bourassa v. Busch Entertainment*, 929 So.2d 552, 556 (2006). Young was required to access an area she was unaware would certainly expose her to noxious levels of ammonia if the release valves operated properly upon trigger. Her injuries resulted from Cargill's failure to disclose the location of the relief valve to employees working in close proximity to the refrigerant systems and to adhere to engineering designs that would allow the relief valves to fulfill their purpose safely. The suction valve's inadvertent placement also implicate a disregard for the serious gravity of harm its mishandling could cause.

QUESTIONS PRESENTED.

WILL THE UNITED STATES FILE ADDITIONAL CHARGES AGAINST CARGILL FOR VARIOUS OTHER ENVIRONMENTAL VIOLATIONS?

In the United States Court of Appeals for the Eight Circuit the government through the Environmental Protection Agency has filed suit against Cargill. In **United States v. Cargill** 10-2732 the government issued Cargill various citations for air pollution and Cargill has not complied with governmental regulations, and since some of the violations start as early as January 1997 and litigation is in progress, it is feasible that the United States may amend their complaint to include violations of OSHA regulations in Cargill's' Florida plants.

The court in **In RE: Cargill Fertilizer** stated On September 5, 2004, **Cargill** reported the breach of a gypsum dam within the System, resulting in the discharge of partially neutralized or untreated process wastewater into waters of the State.

Cargill has managed to stop the flow and temporarily plug the breach. However, the System continues to be in the "must-treat" trigger status specified in *40 CFR 418.13* and Chapter 62-672 of the Florida Administrative Code, with process wastewater levels at or near the maximum emergency elevations. These emergency levels cannot be sustained over a long period of time without compromising the integrity of the dam structure. Cargill's third-party engineer has recommended that levels within Cargill's cooling pond be lowered as soon as possible to prevent a catastrophic failure resulting in severe harm to human health and the environment. The department of Environmental Protection entered the following order (in part): Cargill is hereby ordered to take immediate actions to stabilize ... dams at the Facility to prevent a catastrophic release of untreated wastewater from the Facility. Actions to permanently stabilize the area ... shall be completed as soon as practicable.

Cargill shall lower the water level in the cooling pond at the Facility to the level recommended by Cargill's third party engineer as soon as practicable. Cargill shall continue current operations to transfer process wastewater from the cooling pond at the Facility to the top of the Closed Stack until filled to its capacity, and shall maintain adequate freeboard to contain weather events associated with a 25-year/24 hour storm event. Cargill shall complete the first batch treatment of process wastewater from the cooling pond with caustic soda or other suitable neutralizing agent, and temporarily store this water in the storm water swale located at the base of the active gypsum stack, and shall discharge such batch treated water as needed to avoid a catastrophic failure of the facility process wastewater containment system. The process wastewater neutralization shall be continued as rapidly as practicable until completed.

Cargill shall submit plans within 24 hours of the time of receipt of this Order to the Department for review and approval to neutralize a minimum volume of 100 million gallons of process wastewater with caustic soda, lime or other suitable neutralizing agent in other compartments in the cooling pond or other ponds on site. Any actions taken by **Cargill** under this Immediate Final Order shall not be construed to limit the Department's exercise of its enforcement authority...,(nor shall Cargill)cause damage to natural resources. In the United States District Court for the Middle District of Florida, Tampa Division, **Gates v WR Grace et al(Cargill is a named defendant)** case no: 8:08 cv-2560-t-27TBM Mr. Gates, the plaintiff alleged that Cargill and the other defendants (successors in interest) negligently released and discharged toxic contaminants into the ground water aquifer system, which spread into Mr. Gates' well which he used for drinking and cooking, Mr. Gates also alleged that Cargill released and discharged toxic contamminants into the air and soil upon his property.

According to deposition in the current case, Cargill's Avon Park Plant had several OSHA violations that were never corrected.

DOES CARGILL EMPLOY UNDOCUMENTED WORKERS PURPOSELY TOAVOID EMPLOYER LIABILITY, THUSLY DEMONSTRATING A SYSTEMATIC PATTERN OF ABUSE TOWARDS ITS WOKERS INJURED AT ITS PROCESSING PLANTS?

In this case Cargill employed many undocumented workers some whom were injured in the explosion of December 2001.[7] In the 5th Circuit court of Appeals the case of **Espinoza v Cargill** no: 09 11170. The plaintiff also worked in a processing plant that employed mostly undocumented workers.

[7] See Carla Rushings' affidavit paragraph 10. in Appendix B of Writ of Certorari

IS CARGILL'S SYSTEMATIC AVOIDANCEE OF RESPONSIBILITY A FORM OF CONTEMPT OF THE LAW?

On October 6, 2010 the United States District Court for the Northern District of Iowa, Eastern Division **Ney Leasing Corporation Inc. v. Cargill Meat Logistics Solutions** No 2:09-cv-01051.

In a contract dispute Cargill was denied summary judgment, the court stated "Summary judgment is not appropriate if the non-moving party can set forth specific facts, by affidavit, deposition, or other evidence, showing a genuine issue for trial." quoting **Baum v. Helget Gas Products, Inc.**, 440 F.3d 1019, 1022 (8th Cir. 2006) The court in Ney also stated, "A party's entitlement to plead alternative theories of recovery should not be confused with the election-of-remedies rule." This case is set for trial on November 8, 2010. In the United States District Court for the District of Columbia the court in **United States of America v Cargill Inc.** No 99-1875 the court ordered Cargill to divest interest in grain elevators around the country based on the

Antitrust Procedures and Penalties Act 15 U.S.C.§ 16.

Since there now exists a clear and express conflict of decisions among the circuits on an important question of federal law affecting many people in different parts of the country, compelling reasons are evident why the questions presented should be reviewed and definitively determined by this court.

CONCLUSION

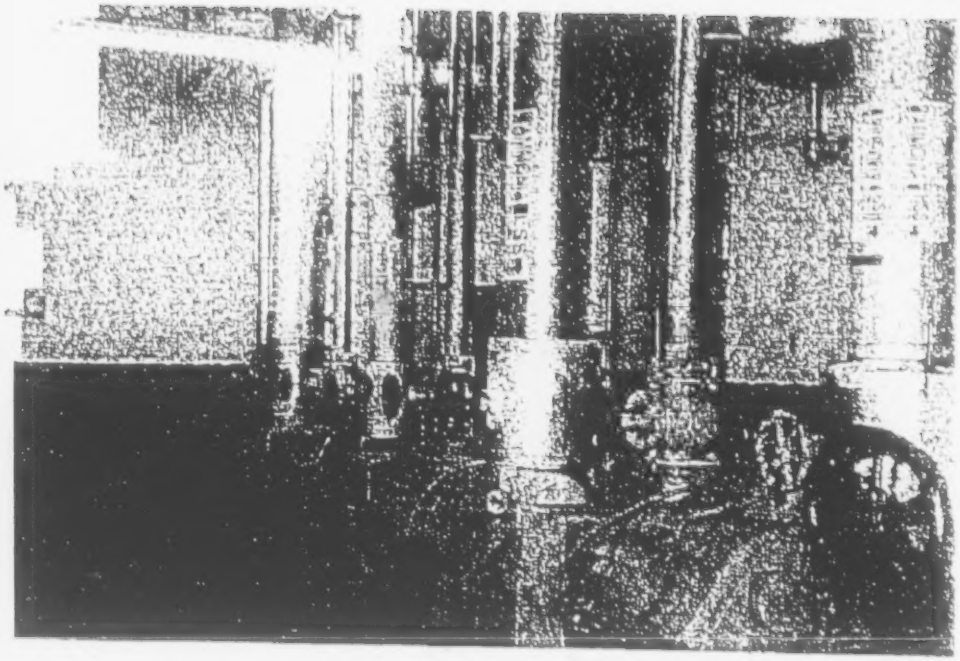
For the reasons set forth in this petition for rehearing, as well as in the petition for certiorari previously filed, rehearing and certiorari should now be granted.

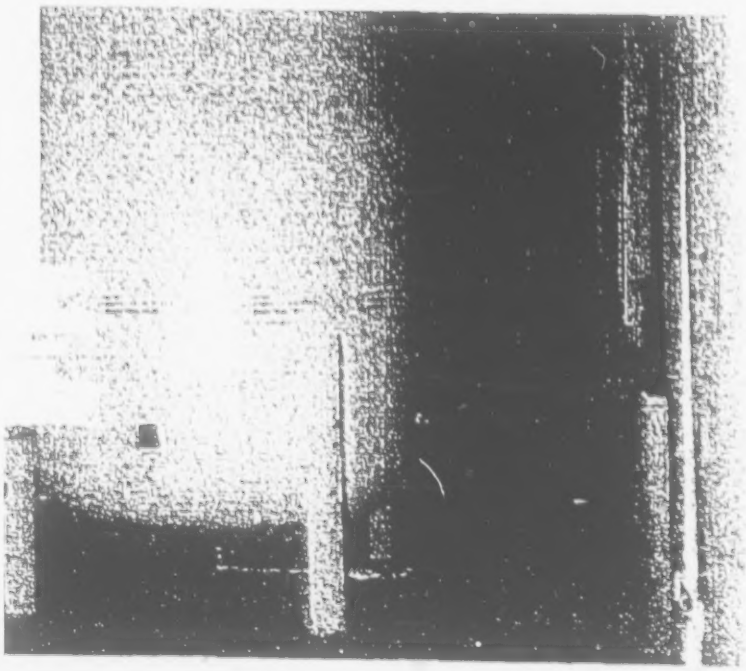
CERTIFICATION OF COUNSEL

Counsel of record for petitioner, does promise that this petition for rehearing complies with Supreme Court Rule Number44 and the grounds presented are solely based on that rule and that this petition has not been presented for delay of time and has been presented in good faith.
Respectfully Submitted,

Marcia Vestylena Forsett
11 Elkhorn Drive
Frostproof, FL 33843
863-605-5359 phone
863-582-9359 fax

APPENDIX
A





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APPENDIX
B

(MB)

Follow up on Ammonia incident

Heading:

Ray Spurlock	Maintenance Mgr
Larry Hooten	EHS Manager
Mike Vandermiff	Safety Supervisor
Mike Maloney	Citrus Force - Safety Supervisor
Bill Brey	Director of operations.
Miriam Saylor	Refrigeration maintenance
Gary Cutrel	Citrus Force Supervisor - I-4
Robert Sarapeza	Citrus Force Supervisor - AG

Discussed citrus force personnel status.

Talked about action plan as to eliminate relief valve from relieving at ground level. Tied back into system.

All agreed about 7:10 AM incident occured. The relief valve vented to atmosphere at ground level. Refrigeration operator said less than 15 seconds. Robert walked out of office and could smell the ammonia. Wind was blowing the ammonia towards the parking lot. (South / South East) Robert has a roster of both shifts signed in. Discussion on how soon the plant shift Supervisor has the roster of temp employees. Citrus Belle uses a hand horn to notify plant personnel to muster. Will look at audible alarm system to notify employees of need to evacuate.

Group discussed the operation of the essence recovery unit. The evaporator operator turned off the essence units off and immediately the relief valves. The suction valve after investigation was found closed. The valve looks similar to a water hose valve and could have closed inadvertently. The design of the relief valve vent should have been piped above grade. Temporary we will remove handles from suction valves. Discussed relocating suction valves above tanks. A full count press will be placed on valve and line identification, assessment of relief valves and where they vent. Write procedure for startup this system. Till a permanent audible system is installed, we will buy portable horns and have a muster point Monday morning.

APPENDIX
C

Loudermilk, Mike /fros

From: Hadden, Larry /fros
Sent: Saturday, December 29, 2001 2:12 PM
To: Abrahamson, Tom /fros; Botos, Joseph /tdqt; Brady, Bill /tdqt; Damasin, Michael /tdqt; Jason, Greg /tdqt; Kelly, Bryce /fros; Larson, Stephen /tdqt
Cc: Bryant, Mike /fros; Ellis, Glenda /fros; Everett, Gene /fros; Hadden, Larry /fros; Loudermilk, Mike /fros; Matthiesen, Todd /fros; Plair, Larry /fros; Respress, Kevin /fros; Roberts, Gary /fros; Spurlock, Ray /fros; Stueve, Larry /fros; Tucker, Gene /fros
Subject: Avon Park ammonia incident

Saturday, 12/29/01, approximately 7:10 a.m. (during shift change), our Avon Park, Fl. facility had an ammonia related incident that involved having 27 personnel being taken to the hospital to be checked out.

The initial investigation has determined the following:

During the juice evaporation process, there is a water phase essence receiving/holding tank (capacity, approx. 1,006gals), that is ammonia jacketed to keep the product chilled for preservation. The tank is designed with a relief valve in the event of excessive pressure build up within the ammonia system. If the incoming product (water phase essence), is not chilled sufficiently prior to entering the tank, the refrigerant (liquid ammonia), within the jacket of the tank will begin to boil (rapid expansion) and create enough pressure for the system to relieve itself via the relief valve. At this time, this is what we and the operator believes happened.
When the ammonia system vented itself, there was an ammonia vapor cloud that was created for approximately 15-30 seconds, with less than 10 pounds released. The weather conditions at the time were, an approaching cold front with overcast skys, the air temperature was approximately 60 degrees F., a light mist of rain, with winds out of the south, conditions ideal for keeping ammonia vapors down at ground level.
The incident occurred during shift change when we had some employees arriving for work and some preparing to leave. The ammonia vapor was carried in the general direction of the parking lot/entrance to the plant, where the highest number of personnel was. When the smell of ammonia was reported, the security guard immediately called 911. he did not contact the on duty shift supervisor to discuss a response to the situation. The 911 dispatcher immediately dispatched emergency response teams from the Highlands County area, that included fire rescue trucks, ambulances and sheriff's department personnel.
During the incident, the plant was evacuated. The emergency medical personnel determined that there were a total of 27 people that had enough exposure that they should be taken to area hospitals to be checked over. The total included, one (1) Cargill Citro Pure employee, two (2) Florida Department of Agriculture Inspectors and twenty four (24) temporary Citrusforce employees. The situation was under control and the plant back in operation within an hour of the incident.

At the time of this report, the Cargill Citro Pure employee was released to return to work with only eye irritation. The contract employees were taken to three different area hospitals. We've received word that 7 have been checked out and released. We are still awaiting word from their management concerning the status of the other 17.

After the incident, after discussions with Bryce Kelly and Larry Weir, I provided statements to the news media, Highlands Today and the Highlands County Sun, concerning the facts of the incident. I gave them my name as the contact person for the incident. This wire will provide you with enough information for INTERNAL questions.
PLEASE REFER ALL EXTERNAL INQUIRIES OF THE INCIDENT TO EITHER BRYCE KELLY, LARRY WEIR OR MYSELF

CAR 00063

APPENDIX
D

S. Department of Labor
cupational Safety and Health Administration

Inspection Number: 304986334
Inspection Dates: 01/16/2002 -
Issuance Date: 06/27/2002

Citation and Notification of Penalty

Company Name: Cargill Citro Pure, L.P
Inspection Site: 1552 Sun Pure Road, Avon Park, FL 33825

The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for injury resulting from an accident.

Citation 1 Item 2a Type of Violation: Serious

29 CFR 1910.119(e)(1) The process hazard analysis was not conducted as soon as possible or in accordance with the schedule presented in 29 CFR 1910.119(e)(1)(i) through (e)(1)(v):

a At the site, employees were involved in citrus juice manufacturing operations where a refrigeration system was used containing approximately 29,000 pounds of anhydrous ammonia. The employer did not conduct Process Hazard Analysis for the refrigeration process to address at a minimum the following:

The hazards of the process;

- Engineering and administrative controls applicable to the hazards and their interrelationships such as appropriate application of detection methodologies for early warning of releases;

3. Consequences of failure of engineering and administrative controls;

4. Facility siting;

5. Human factors;

6. A qualitative evaluation of a range of the possible safety and health effects of failure of controls on employees.

Safety and health issues encountered during the inspection include but are not limited to the lack of any type of a suppression system such as a rapid deluge system; shut-off valves were not easily accessible in the event of an emergency; no alarms or sensors and no warning devices were available in all areas where ammonia was used as a refrigerant; no evaluation of facility siting and employee work areas to assure safe passage in the event of a release; no evaluation of human factors; no evaluation of hazardous location and use of explosion proof equipment in areas where ammonia is likely to be present in the event of an emergency; no evaluation for the need of emergency escape respirators from areas where ammonia is used and stored; no preventive maintenance programs, procedures and administrative controls were in place to assure the ongoing integrity of the vessels and equipment to include safe operating procedures and mechanical integrity procedures.

"ABATEMENT DOCUMENTATTION REQUIRED"

---

ee pages 1 through 4 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

APPENDIX
E

INCIDENT INVESTIGATION REPORT -- FOR EMPLOYEE INJURY, PROPERTY DAMAGE AND NEAR MISS REPORTING

INSTRUCTIONS SEE BACK OF FORM

THIRD PARTY INCIDENTS SHOULD BE INVESTIGATED USING A GENERAL LIABILITY FORM

This form and the information contained in it will be used by the company's legal advisors in the event of litigation

1 General Info

☑ Injury/Illness ☐ Property Damage ☐ Near Miss | CRITICAL? ☐ Yes ☐ No | LOCATION CODE: (AVON PARK, FL.) 13467 | CLAIM(S) FILED? ☑ Yes ☐ No

COMPANY NAME: Cargill Citro Pure, L.P. | PLANT LOCATION (City, State or Country): Avon Park, FL. | EXPLICIT AREA (Dept, Building, Area, Etc): Highlands Co. Evaporation Essence Holding Tanks

CLAIMS ADJUSTER NOTIFIED? ☐ Yes ☐ No ☐ N/A | TIME OF THE INCIDENT: 7 10 ☑ AM ☐ PM | DATE OF INCIDENT occurred: 12, 29, 01 | DATE INCIDENT REPORTED: 12, 29, 01 | DATE OF CLAIM REPORTED TO CARRIER: 12, 29, 01

2 Personal Injury Section

NAME (First, Last, Middle Initial): ** Multiple persons (SEE LIST ATTACHED) | DESCRIPTION OF INJURED PERSON(S): 1 - Company employee 2 - FL Dept. of Ag. 3 - Cargill Citrus 4 - Temporary Laborers (34) | ENTERED ON OSHA LOG? ☐ Yes ☐ No | ACCIDENT CATEGORY: ☐ Lost Time ☑ Medical Aid

LENGTH OF EMPLOYMENT: 4.3Y - Temp. Labor (Hospitalized) | LENGTH IN PRESENT JOB: | SHIFT: ☑ 1st ☐ 2nd ☐ 3rd ☑ Rotating | DRUG TEST: ☑ Yes ☐ No

NATURE OF INJURY: Irritation | BODY PART AFFECTED: Lungs / eyes | CAUSE OF INJURY: Chemical contact / exposure

3 Property Damage Section

EQUIPMENT DAMAGED: N/A | $ VALUE | LOST PRODUCTION THAT CANNOT BE RECOVERED: | $ VALUE

PRODUCT DAMAGED: N/A | $ VALUE | OTHER: | $ VALUE

CAUSE OF LOSS: N/A | TOTAL $ LOSS

4 Description

DETAILED EVENTS LEADING TO THE INCIDENT:
- Evaporator Essence Holding Tanks vented to atmosphere for a few seconds creating a vapor cloud of Ammonia for 15-30 seconds. Wind blew cloud in general direction of Temporaries coming on shift and FDA Lab. Exhaust operation suction fans drew cloud in area.

WHAT ACTS OR CONDITIONS CONTRIBUTED DIRECTLY TO THE INCIDENT?:
- Ammonia tank vented (guards for protection) to atmosphere

WHAT PERSONAL AND JOB FACTORS CONTRIBUTED TO THE INCIDENT?:
- Mental/psychological stress - Engineering design / wear & tear
*** Maintenance - suction valve (1") closed prior to incident, by person(s) unknown - Valve handles removed to prevent future closure by (Management)

5 Prevention

PROBABILITY OF EVENT RECURRING: ☐ Likely ☑ Possible ☐ Unlikely | SEVERITY POTENTIAL: ☐ Major ☑ Serious ☐ Minor | EXPOSURE FREQUENCY: ☐ Frequent ☑ Occasional ☐ Rare

IMMEDIATE FIX - WHAT WAS DONE TO CORRECT THE ACTION THAT HAS BEEN TAKEN TO PREVENT A RECURRENCE?:
- Tanks Ammonia system closed off & locked out until manufacturer can inspect system for any problems (ie) leaks or vent valve integrity.

PERMANENT MEASURES - WHAT CORRECTIVE ACTION HAS BEEN OR WILL BE TAKEN TO ELIMINATE THE SUBJECT EVENT?:
- Will inspect, repair if needed and redesign vent valve system if determined necessary. (Pipe vent valves above 15' ht.) 1/02/02
*** Handles removed from Suction Valve (1")

6 Signatures

DRUG/ALCOHOL TEST COMPLETED? ☐ Yes ☐ No | DATE PREVENTION COMPLETED:

REPORTED BY: Larry Flair / Madden | DATE: | INVESTIGATED BY: Ray Sosebee | DATE: | DATE INVESTIGATION COMPLETED:

REVIEWED BY: | DATE REVIEWED:

EHS 562 REV 7/99 DISTRIBUTION: WHITE - Corporate Safety; Copy YELLOW - Business Unit Copy; PINK - Plant Manager's Copy

* Report updated on 12/31/01, when list of hospitalized temporary laborers was received. (FFH)
** Report updated on 1/02/02, when the complete temporary laborer list was received. (FFH)
*** Report updated on 1/23/02 - gave copy to OSHA Inspector - Christos (FFH)

CAR 00066

APPENDIX
F

Local & State

■ Obituaries, p.4
■ State News, p.5

DATELINES

LAKE WALES

Ammonia Leak Hospitalizes 5

Five workers were taken to area hospitals after an ammonia leak at the Citrosuco North America plant on State Road 60, said Larry Alexander, Polk County director of public safety.

The leak occurred about 9 p.m. inside the processing plant at 5937 S.R. 60 E., Alexander said.

Five people who inhaled ammonia were taken to area hospitals, a plant supervisor said. Two were in serious condition.

Their names were not available late Monday night.

Lake Alfred Manager Resigns

Jim Drumm is offered a $39,740 settlement for stepping down.

By MELISSA GREEN
The Ledger

Commission unanimously approved an agreement that provides for his resignation in exchange for a $39,740 settlement.

Drumm

"I think it's a was a good resolution.

"I know that I have not done anything wrong," Drumm said. "However, the commission still has the prerogative to dismiss me."

He had been put on paid leave earlier this month, and City Clerk Jan Shockley was named interim city manager.

QUESTIONING SUSPECTS

Lab Test May Shed Light on

APPENDIX
G

BIELUNAS v. MISTY DAWN INC
Wojciech BIELUNAS, Plaintiff, Appellee,
v. F/V MISTY DAWN, INC., Defendant,
Appellant.
No. 09-2048.
-- October 08, 2010

Before BOUDIN, GAJARSAand THOMPSON, Circuit Judges.*

Joseph A. Regan, with whom John David Blaisdell and Regan & Kelley LLP were on brief, for appellant.Joseph S. Stacey, with whom James P. Jacobsen and Beard Stacey & Jacobsen LLP were on brief, for appellee.

This case-according to Wojciech Bielunas-is about life-altering pain. Working as a commercial fisherman aboard the F/V SEA WATCHER I, Bielunas had his right foot crushed in a ghastly accident. An orthopedic surgeon said it looked like someone had taken a sledgehammer to Bielunas's foot. His livelihood lost, Bielunas later sued the vessel's owner, F/V Misty Dawn, Inc., charging Jones Act negligence,[1] ship unseaworthiness, and a right to maintenance and cure.[2] A jury returned a verdict in Bielunas's favor, and the district judge entered judgment against Misty Dawn for $2,307,690. In this arena, Misty

Dawn criticizes the district judge for admitting certain evidence and denying a motion for new trial or remittitur. Detecting no hint of reversible error, we affirm the judgment below.

Background

We present the facts in the light most flattering to the jury's verdict. See, e.g., Whitfield v. Melendez-Rivera, 431 F.3d 1, 3 (1st Cir.2005). Bielunas emigrated from Poland to the United States with his family in 1995, eventually settling in rural Pennsylvania. He had worked on fishing boats before leaving Poland, and he became a commercial fisherman here. From 2005 through 2006, Bielunas worked for Misty Dawn, a Massachusetts corporation, on its vessel, the SEA WATCHER.

Safety was hardly the watchword for Misty Dawn's conduct. The company made no real effort to ensure that its employees complied with accepted safety standards. Misty Dawn had some safety guidelines, but they were not posted anywhere on the SEA WATCHER. Instead, the company relied on word-of-mouth, with ownership passing safety concerns to the captain who then passed them on to the crew. But there is some dispute whether ownership

ever did this.

To make the venture as profitable as possible, Misty Dawn stored clam cages on the walkways. With the walkways blocked, crew members looking to traverse the ship had to sidle along a thin, unguarded ledge overlooking a nine-foot drop into the cargo hold or amble over a conveyor belt. But the conveyor belt was not a realistic option because the belt was quite slippery and the system lacked adequate handrails, so the crew (including the captain) opted to shimmy along the hatch ledge. Apparently no one told them not to do this.

That brings us to the accident. Asked to help close the hatch that covered the cargo hold, Bielunas had to indicate to another crew member when the cover was in the proper position-a wire cable attached to a hydraulically-powered machine would haul the hatch forward along the ledge. Ideally, one would perform this job by standing on the designated walkways. But because they were blocked, Bielunas rode atop the closing hatch cover-that is how he and others had done it before, and no one had ever told him to do it differently. Unfortunately, he lost his balance, stepped onto the ledge to keep from falling

into the cargo hold, and got his right foot caught between the cover and a protruding piece of metal. "Stop, stop," Bielunas yelled, hoping to get the attention of the seaman operating the hydraulically-powered machine. Bielunas could feel steel pressing into him, crushing his foot. Flesh and muscle were stripped off the bone, leaving a gaping hole. Blood was everywhere.

The Coast Guard airlifted Bielunas to a hospital on Cape Cod, where a doctor performed a series of emergency surgeries. The doctor noticed that about half of the bone material was dead. He removed the dead matter and a significant amount of dead muscle and tissue, too, but he could not close the wound. Eventually, after nearly two months, doctors sealed the opening, but Bielunas's foot is still disfigured, and the damage is severe, permanent, and degenerative. As if this were not enough, Bielunas walks with a pronounced limp, and his altered gait triggered back and knee problems. Bielunas will never be able to return to any form of hard work. His poor English skills make it highly unlikely that he will ever be able to do office or clerical work. Because this work is the only kind of

employment that a person with his new physical disability would be capable of performing, Bielunas will likely never be able to work again-he can even cross-off pizza delivery and security guard from any list of potential jobs because his mangled foot affects his driving and ability to patrol a site, too.

Bielunas's total medical and economic damages approximated $762,000. In his opening statement, Bielunas's lawyer pushed for a $2,500,000 damages award, which he upped to $3,328,767 in his closing. The jury returned a $2,775,000 verdict against Misty Dawn but also found Bielunas 15% comparatively negligent. Factoring in the 15% figure and an agreed-upon set-off between the parties, the district judge entered a $2,307,690 judgment in Bielunas's favor. Misty Dawn moved for a new trial or a remittitur, which the district denied in an unexplained order.

With this background in place, we turn to the issues presented on appeal, highlighting further facts when needed to put Misty Dawn's claims into proper perspective.

Evidentiary Issues

Misty Dawn contends that the district

judge erred in admitting plaintiff's exhibit 32 and Lawson Bronson's expert testimony. Neither claim has traction.

Plaintiff's exhibit 32

The protested exhibit is a staged photo (apparently taken by a defense expert) of a deckhand holding a wire and sidling along a nine-inch hatch ledge, as the SEA WATCHER's crew frequently would. Misty Dawn argues here, as it did below, that the exhibit is irrelevant because Bielunas was injured while standing on the moving hatch cover-not while traveling along the hatch ledge holding a wire. This argument is easily disposed of. A relevancy-based argument is usually a tough sell. The definition of relevance is quite expansive: relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence" more or less probable. See Fed.R.Evid. 401 (emphasis added). To be relevant, the evidence need not definitively resolve a key issue in the case, see, e.g., United States v. Rivera Calderón, 578 F.3d 78, 96-97 (1st Cir.2009), cert. denied, 130 S.Ct. 1107 (2010)-it need only move the inquiry forward to some degree, see 2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence §

401.04[2][b] (Joseph M. McLaughlin ed., 2d ed.2010). Because this is a quintessential judgment call, see Morales Feliciano v. Rullán, 378 F.3d 42, 57 (1st Cir.2004), we give trial judges considerable leeway in deciding whether the contested evidence satisfies this not-too-difficult-to-meet standard, reversing only on a showing of abuse of discretion, see, e.g., United States v. Sepulveda, 15 F.3d 1161, 1194 (1st Cir.1993).

Relevancy is not assessed in a vacuum-it is gauged "in light of the underlying substantive law," see Roy v. The Austin Co., 194 F.3d 840, 843 (7th Cir.1999), here, Jones Act negligence and ship unseaworthiness. A Jones Act shipowner must see "to the safety of the crew." Koehler v. Presque-Isle Transp. Co., 141 F.2d 490, 491 (2d Cir.1944) (Frank, J.). A crew member's burden of proving causation is "featherweight," meaning liability exists if the shipowner's "negligence contributed even in the slightest" to the injury. Ferrara v. A. & V. Fishing, Inc., 99 F.3d 449, 453 (1st Cir.1996) (quotation marks omitted). Also, a shipowner must keep the ship-its decks, passageways, equipment, etc.-in a

seaworthy condition and must use safe work methods, too. See id. And a shipowner is responsible for unseaworthiness-induced injuries even if not negligent. See id.

If a picture speaks a thousand words, this one spoke plenty, giving context so the jury could better understand the parties' actions. Again, the photo showed a seaman inching his way along a tiny hatch ledge with no guardrails while lugging a wire-an unacceptable practice, Bielunas's expert said, which Misty Dawn turned a blind eye to and which highlighted Misty Dawn's cavalier attitude toward safety. The photo also showed a ship with blocked walkways, which further bolstered Bielunas's theory that Misty Dawn failed to provide a safe deck for work on the high seas. Misty Dawn talked a good game about how crew safety was a top concern, but the photo suggested otherwise. Seen in this light, then, the photo tended to make Misty Dawn's negligence and the ship's unseaworthiness more probable, see generally DeGioia v. United States Lines Co., 304 F.2d 421, 423 (2d Cir.1962) (holding that a cluttered deck constitutes Jones Act negligence and vessel unseaworthiness); Bonnewell v. United

States, 170 F.2d 411, 412-13 (4th Cir.1948) (same)-which is all the liberal relevancy standard requires, see, e.g., Iacobucci v. Boulter, 193 F.3d 14, 20 (1st Cir.1999). Consequently, the district judge did not abuse his broad discretion in admitting plaintiff's exhibit 32.

Bronson's testimony

Also sailing wide of the mark is Misty Dawn's claim that the district judge stumbled in admitting Bronson's testimony about the means of traversing the deck, the danger of obstructing the walkways, and other safety problems on the SEA WATCHER. Misty Dawn calls this testimony irrelevant and says its admission affected the verdict (Misty Dawn does not contest Bronson's expert credentials)-which means we apply the abuse-of-discretion standard. See, e.g., Pagés-Ramírez v. Ramírez-González, 605 F.3d 109, 115-16 (1st Cir.2010). Again, that standard is hard to satisfy, and Misty Dawn cannot satisfy it here.

Bronson's testimony-discussing the meaning and significance of the staged photo, the dangers posed by the open hatch covers and the missing conveyor belt handrails, etc.-went to matters of consequence: did Misty Dawn provide

Bielunas with a safe work place, and was the SEA WATCHER seaworthy? Misty Dawn protests that Bielunas was not hurt while sidling along the hatch ledge (a Misty Dawn-accepted practice that Bronson condemned), that only one cover was open when tragedy struck, and that the missing handrails played no part in the mishap (ignoring that Misty Dawn had faulted Bielunas for not standing on the conveyor belt during the hatch-closing episode, a ridiculously unsafe suggestion, Bronson said, given the lack of handrails). But this evidence gave the jury a proper frame of reference for assessing the parties' competing claims, so it is relevant. See Faigin v. Kelly, 184 F.3d 67, 81 (1st Cir.1999). Misty Dawn could and did fight tooth and nail to undermine the evidence's meaning. But once relevancy is found, complaints of the sort Misty Dawn pursues go to the weight, not the admissibility, of Bronson's testimony. See, e.g., United States v. Schultz, 333 F .3d 393, 416 (2d Cir.2003); United States v. Diaz, 878 F.2d 608, 615 (2d Cir.1989). The upshot of all this is that we do not see anything close to an abuse of discretion here.[3]

The New Trial/Remittitur Issues

In its post-trial motion, Misty Dawn blasted Biclunas's counsel for suggesting a damage award in his opening statement ($2,500,000) and closing argument ($3,328,767), saying counsel's comments unfairly influenced the jury and entitled it to a new trial. Misty Dawn also contended that the jury's ultimate award ($2,775,000, constituting roughly $2,000,000 in non-economic damages, which is the crux of the matter) was simply too large to stand. The district judge denied the motion without comment, so we have two choices: remand for clarification or address the issue head-on "if a reasonable basis supporting the order is made manifest on the record ." United States v. Podolsky, 158 F.3d 12, 16 (1st Cir.1998); see also generally Presley v. United States Postal Serv., 317 F.3d 167, 173 (2d Cir.2003) (noting that "[w]hile a written explanation of a district court's basis for denying [a new-trial motion] is certainly preferable as an aid to appellate review, a separate written opinion is not necessarily required when a district court" rebuffs the motion). We choose option two in this instance.

Suggesting specific damage amount

Misty Dawn did not object to the

specific-damage-award comments in Bielunas's counsel's opening statement and closing summation. Rather, it first surfaced this issue in its new-trial motion. That is still an unpreserved challenge, however, so our review is limited to a search for plain error. United States v. Brandao, 539 F.3d 44, 57 (1st Cir.2008); accord Springer v. Henry, 435 F.3d 268, 283 (3d Cir.2006).

Plain error is one hard test to meet, particularly in civil litigation. See Smith v. Kmart Corp., 177 F.3d 19, 26 (1st Cir.1999). Plain error is (1) error which (2) is so clear that a trial judge should act even without an objection and which (3) affects the appellant's substantial rights-on top of that, even if the appellant makes this required showing, we need not intervene unless the error also (4) seriously impugns the "fairness, integrity, or public reputation of judicial proceedings." United States v. Roy, 506 F.3d 28, 30 (1st Cir.2007) (quotation marks omitted); see also Smith, 177 F.3d at 25; Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. West Lake Acad., 548 F.3d 8, 22 (1st Cir .2008). Consequently, Misty Dawn faces a steep climb nearing 90 degrees-ultimately, that slope is

insurmountable.

Misty Dawn cites no First Circuit cases banning lawyers from suggesting a damage number to the jury. Instead it says that federal courts tend to let counsel make unit-of-time arguments during summation (e.g., a lawyer tells the jury plaintiff's pain is worth X dollars per day, month, or year and then multiplies it by plaintiff's life expectancy to get a lump-sum figure). Bielunas's lawyer did just that, proposing a number and discussing a process through which the jury could reach it.[4]

Some courts permit unit-of-time arguments, some leave the matter to the trial judge's discretion, and some ban the practice outright-though most courts, particularly federal courts, seem to fall into the first two camps. See generally Mileski v. Long Island R.R. Co., 499 F.2d 1169, 1173 n. 2, n. 3, n. 4 (2d Cir.1974) (collecting federal and state cases); Giant Food Inc. v. Satterfield, 603 A.2d 877, 879-80 (Md.Ct.Spec.App.1992) (same). Not this Court, however. We forbid counsel from asking jurors to consider the amount of a party's ad damnum in crafting a damage award, see Davis v. Browning-Ferris Indus., Inc., 898 F.2d

836, 837-38 (1st Cir.1990); see also Wilson v. Bradlees of New England, Inc., 250 F.3d 10, 23 n. 25 (1st Cir.2001)-and we have cited approvingly a case outside this circuit for the point that lawyers cannot state in summation the number they think jurors should award for pain and suffering. See Davis, 898 F.2d at 837 (highlighting Waldorf v. Shuta, 896 F.2d 723 (3d Cir.1990)). Building on this foundation, we held in an unpublished opinion that Davis precludes counsel from requesting a pain-and-suffering dollar amount in closing. Kimberly F. v. Mary Hitchcock Mem. Hosp. & Hitchcock Clinics, Inc., No. 93-1438, 1993 WL 498026, at *9-10 (1st Cir. Dec. 3, 1993) (unpublished). Consistent with the Davis line of cases, district judges in this circuit have stopped lawyers from doing just that. See Wilson, 250 F.3d at 23 n. 25; see also generally Budet-Correa v. United Parcel Serv., 322 F.Supp.2d 139, 141-42 (D.P.R.2004) (discussing and applying Davis and the like). Consequently, measured by our precedents we conclude that the district judge here made a mistake, and that the mistake is obvious enough. But, again, plain error requires more: the mistake must also be prejudicial

in a sense that there is a reasonable probability (not just a theoretical possibility) that it affected the result, and the result must be unjust, too. See United States v. Marcus, 130 S.Ct. 2159, 2164 (2010); see also United States v. Padilla, 415 F.3d 211, 225 (1st Cir.2005) (Boudin, C.J., concurring) (en banc). This is where Misty Dawn gets tripped up.

For starters, we are not convinced that this was a game-changing error. Cf. United States v. Taylor, 54 F.3d 967, 972 (1st Cir.1995) (stressing that the plain-error doctrine focuses on "blockbuster[ ]" errors) (quotation marks omitted). We question whether Misty Dawn can show that it is reasonably probable-as opposed to merely possible-that the jury would have fixed a different damage figure absent the unit-of-time breakdown. That the jury found Bielunas 15% comparatively negligent as opposed to the 5% his lawyer had argued for suggests that the jury did not blindly adopt counsel's analysis. But we need not dwell on this issue. See Johnson v. United States, 520 U.S. 461, 469 (1997) (skipping over the third component of the plain-error test and deciding the case on the fourth prong).

Assuming for argument's sake that the breakdown affected the outcome of the case, we see no injustice here: given that Bielunas will live out his life in pain, deprived of his livelihood (details we delve more deeply into below), we cannot say that the award is intolerable.

If more were needed-and we doubt that it is-the judge in his charge made clear that the lawyers' statements and arguments were not evidence and that the verdict must be reached on the evidence alone. Misty Dawn's counsel did not object or request any instruction on the unit-of-time issue. After deliberating for a bit, the jury asked the judge if Bielunas's lawyer could go over the "suggested award amounts" and the "reasoning" used to reach them. Misty Dawn's attorney asked the judge to remind the jurors that arguments were not evidence in the case and that they are "to decide" the matter "on their own." The judge agreed and told the jury:

I presume that you are referring to the plaintiff's counsel's argument to you where it was all laid out. I am not going to have him do that again nor should he have to do it again.

What I want you to do is to use your collective memories as to what he said and

what reasoning he offered for the conclusions that he suggested to you. And have in mind what I told you before, that statements of counsel are not the evidence in the case. You are supposed to remember what the evidence was. What counsel was endeavoring to do was to remind you of what the evidence was and put his interpretation before you so you could consider it. So that is the answer to that. You are to try to remember the evidence yourself.

Misty Dawn's lawyer did not object or ask the judge to say anything else, and we think the judge's instructions help undercut any plain-error claim. See United States v. Robinson, 473 F.3d 387, 398 (1st Cir.2007).

Plain error is not an "appellant-friendly" standard, United States v. Vazquez-Molina, 389 F.3d 54, 57 (1st Cir.2004), vacated on other grounds 544 U.S. 946 (2005), and rightfully so: it keeps parties from rolling the dice on a favorable verdict and then raising problems on appeal that could have been easily fixed with a timely objection below. See, e.g., United States v. Jacquillon, 469 F.2d 380, 386 (5th Cir.1972) (Wisdom, J.).

Ultimately, that standard-which is

exceedingly tough to meet-cannot be met here.

The damage amount

As a parting shot, Misty Dawn calls the jury's non-economic damage award (over $2,000,000) unreasonably high and faults the district judge for not ordering a remittitur. We see things differently. Converting legal damages into a monetary award is the jury's job-consequently, only rarely and in extraordinary circumstances will we veto the jury's decision. Casillas-Díaz v. Palau, 463 F.3d 77, 82-83 (1st Cir.2006). That is particularly true when the district judge, who saw and heard the evidence play out, refuses to trim the award. Id. at 83. Stepping lightly, we review that ruling for abuse of discretion, reversing only if the defendant carries the weighty burden of proving that the contested award is "grossly excessive, inordinate, shocking to the conscience of the court, or so high that it would be a denial of justice to permit it to stand." Id. (quotation marks omitted). This means that we will not jettison a damage award simply because we think it too generous, see Whitfield, 431 F.3d at 15-16, but will reverse "only if it is shown to exceed any rational appraisal or estimate of the

damages that could be based upon the evidence before the jury ." Casillas-Díaz, 463 F.3d at 83 (quotation marks omitted). There is no mathematical formula for determining the monetary equivalent of non-economic injuries. See, e.g., Limone v. United States, 579 F.3d 79, 105 (1st Cir.2009). But the district judge told the jurors, without objection, that they could consider any physical, mental, or emotional pain Bielunas has suffered, is suffering, and will suffer because of his wounds. Damages must be reasonable and not based on hunches, the judge stressed, but "no evidence of value" is needed for the intangible injuries: in translating a decision into dollars, "you are not determining value but you should award an amount that you feel will fully and fairly compensate" Bielunas for his past, present, and future mental distress and physical pain. The issue, then, is inescapably "fact-bound," see Casillas-Díaz, 463 F.3d at 83, and the facts, measured under the legal criteria outlined above, support the district judge's decision not to pare down the award. Bielunas suffered unimaginable pain on the SEA WATCHER, and pain clings to him still. A multi-ton hatch cover crushed

his foot, pulverizing a bone, fracturing others in multiple places, and leaving the whole thing a bloodied mess. The doctors could not close the wound for the longest time, and they will never make him fully better-actually, things will only get worse. And the injury has exacted quite a toll, causing him to lose many of the things that made his life worth living. No more working on a fishing boat-in fact, no more meaningful employment at all. No more taking long hikes with friends and family. No more doing certain chores around the house. No more helping neighbors with home-improvement projects. All of this has left him feeling powerless, lost, and depressed. He worries about his future, he lashes out at others, and his marriage has suffered, too. Taking everything into account, we cannot say that the jury's award is unconnected to the evidence, conscience-shocking, or so lavish that it would offend common notions of justice if it stands-so no remittitur is needed. Misty Dawn makes much of the fact that Bielunas does not take pain medication and had fractured the heel on the same foot years before, an injury that Misty Dawn's expert suggested caused many of the same problems that Bielunas

complains about now. None of this changes our view of the case, however. Again, Bielunas explained in exquisite detail how much pain he had after the hatch cover tore a hole in his foot and how much pain he has now-constant, he said, even though he avoids pain pills, and the medical evidence backs up his chronic-pain claim. As to the heel issue, Bielunas never missed a day of work because of that injury, a fact that pours cold water on the expert testimony that Misty Dawn points to-testimony that the jury could, and evidently did, disbelieve in any event. Cf. Primus v. Galgano, 329 F.3d 236, 245 (1st Cir.2003).

Citing to Anthony v. G.M.D. Airline Serv., Inc., 17 F.3d 490 (1st Cir.1994), and Laaperi v. Sears, Roebuck & Co., 787 F.2d 726 (1st Cir.1986), Misty Dawn also argues that because we rejected jury awards there, we should do so here. But these cases offer no aid. For one thing, they are 16 and 24 years old, respectively, which in this context makes them "not particularly helpful" for comparison purposes, see Whitfield, 431 F.3d at 16 (saying so with respect to a 16-year-old precedent). For another thing, they are easily distinguishable from this case.

Anthony found a $566,765 pain-and-suffering award unconscionable because the plaintiff's injury-which was neither painful (relatively speaking) nor permanent-did not "render[ ] him unable to perform any particular functions or engage in any particular activities [or] otherwise interfere[ ] with his professional, recreational, or personal life." Anthony, 17 F.3d at 491, 494-95. Laaperi considered a $750,000 damage award conscience-shocking because the plaintiff suffered "relatively minor injuries, involving no continuing disability" (other than "a non-disabling permanent scar on her lower back, there was no evidence of any medical problems whatsoever within a month and a half" after the incident). Laaperi, 787 F.2d at 734-36. Anthony and Laaperi look nothing like this case, given the huge toll Bielunas's injury has taken on his body and mind.

Misty Dawn also highlights a boatload of non-First Circuit cases where lower courts deemed certain damage awards excessive. Measured against these cases, Misty Dawn says, the objected-to portion of Bielunas's damage award is legally unsustainable. Not so: simply "showing

that the damage award is generous in comparison to other (hand-picked) cases is insufficient to warrant relief." Correa v.. Hospital San Francisco, 69 F.3d 1184, 1198 (1st Cir.1995) (citing Havinga v. Crowley Towing & Transp. Co., 24 F.3d 1480, 1488-89 (1st Cir.1994) (not necessary to compare cases involving dissimilar traumas, dates and locations of trials, and evidence presented)); accord Whitfield, 431 F.3d at 16 (stressing that we will not reject a damage award "merely because the amount of the award is somewhat out of line with other cases of a similar nature") (quotation marks omitted). Ultimately, we see no compelling reason to override the jury's judgment here.[5]

Conclusion

For the reasons arrayed above, we reject Misty Dawn's appeal and affirm the judgment below in all respects. Each side shall bear its own costs.

So Ordered.

FOOTNOTES

1. 46 U.S.C. § 30104.

2. A venerable remedy created to protect seamen from the dangers of living and laboring at sea, maintenance and cure "refers to the provision of, or payment for,

food and lodging ('maintenance') as well as any necessary health-care expenses ('cure') incurred during the period of recovery from an injury or malady." LeBlanc v. B.G .T. Corp., 992 F.2d 394, 396-97 (1st Cir.1993).

3. Because there was no error, we need not consider Misty Dawn's grumble that the admission of Bronson's testimony affected the trial's outcome, see Fed.R.Evid. 103-a complaint that turns in part on Misty Dawn's claim that Bielunas's counsel weaved Bronson's "irrelevant" testimony into his closing argument. Misty Dawn's brief focuses on the evidentiary issue (which falters, given how easily Bronson's testimony clears the low relevancy hurdle) and makes no attempt to construct a reasoned argument that Bielunas's counsel's closing constituted misconduct, so our work on this is done. See, e.g., McCullen v. Coakley, 571 F.3d 167, 182 & n. 3 (1st Cir.2009) (deeming waived arguments hinted at but not developed and addressed to a particular theory), cert. denied, 130 S.Ct. 1881 (2010).

4. Here is a sampling of what Bielunas's counsel said (again, without drawing any objection):Past and future physical pain and suffering: Noting that there are 365

days in a year, counsel suggested $282,000 for "past physical pain and suffering"-$200,000 for the first year (given the immediate "horror" of the calamity), $50,000 for the second year, and $32,000 for the third. Bielunas is "55 years old," counsel added, and is expected to live another 25 years, so "you should award him $800,000 for future physical pain and suffering because he's going to live with that [pain] every day."Past and future mental anguish: "I think the mental anguish of this thing is conservatively $20,000 a year," counsel said. "That's $20,000 a year for the last three years" and "for the rest of his life," counsel added, which comes to $560,000.Past and future disability and inconvenience: Bielunas's "past disability is permanent," counsel argued. "And I submit to you that $33,000 a year" is a good number to cover "the impairment and the inconvenience," which comes to $924,000.

5. The parties also spar over whether Bielunas's counsel told Misty Dawn's lawyer in a phone call that the award's size "shocked" both him and his client. That makes not one whit of difference: what counts is whether the award shocks

our conscience (it does not), not whether it shocks counsel's or his client's.

Marlene Barnett, Appellant,
v.
Bank of America Corporation, Appellee.
No. 3D09-1326
Lower Tribunal No. 03-14301
Third District Court of Appeal
State of Florida
July Term, A.D. 2010
Opinion filed: October 13, 2010.

Not final until disposition of timely filed motion for rehearing.

An Appeal from the Circuit Court for Miami-Dade County, Ronald Dresnick, Judge.

Krupnick, Campbell, Malone, Buser, Slama, Hancock, Liberman & McKee and Kelley B. Stewart and Robert J. McKee, for appellant.

Thornton, Davis & Fein and Daniella Friedman, for appellee.

Before RAMIREZ, C.J., and COPE and GERSTEN, JJ.

COPE, J.

Page 2

This is an appeal of a summary judgment in favor of Bank of America Corporation based upon employer immunity under the Workers' Compensation Law. The question is whether the plaintiff Marlene Barnett is entitled to proceed against the defendant Bank of America on the basis of the intentional acts exception to workers'

compensation immunity.

In 2002, the plaintiff was the manager at Bank of America's Bay Harbor Island branch. The bank was a tenant on the first floor of a building at 1108 Kane Concourse. The landlord decided to renovate the building, and Bank of America agreed to construct a new banking facility on the first floor.

Bank of America wished to keep its branch open during the renovations. It constructed a temporary banking center occupying part of its preexisting space. The bank employees were moved into that space in May or June 2002.

The plans called for a one-hour rated fire wall to be built from floor to ceiling which would separate the temporary banking center from the construction area. According to the testimony of the plaintiff as well as two other employees, the wall was not built in accordance with the plans, did not run up to the ceiling, and did not completely separate the temporary banking center from the construction area.

According to the depositions, the opening between the construction area and the temporary banking center allowed a constant influx of dust, odors, and fumes.

Each day the computers and tables were covered by a thick layer of dust, including concrete dust and fiberglass particles. The employees were breathing dust and fumes from glue, paints and paint thinners. There was no operable air

conditioning system.
According to the depositions, within several weeks the plaintiff and other employees started becoming ill from this exposure with asthma, bronchitis, sinus problems, nose bleeds, headaches, and dermatitis. Eight of the twelve employees made claims for health problems. According to the deposition testimony, the plaintiff and other employees contacted executives from Bank of America to complain. The plaintiff, as manager, requested that the employees be moved to another location or that the bank bring a trailer to the site to house the temporary bank facility. The executives refused these requests because the branch had a safe deposit area which the bank wanted to keep open for its customers. The plaintiff was ordered to keep her employees working at the existing site. Eventually the bank brought in fans and a cleaning crew. After employees began making workers' compensation claims, the bank also brought in air purifiers and coolers. The employees, however, kept getting sick. In December 2002, the bank temporarily closed the facility but then reopened it. Finally in January 2003, the bank shut down the temporary center and moved the employees to another site.

The plaintiff brought suit against the bank and other defendants for injuries she sustained.[1] The bank moved for summary judgment on the basis of workers' compensation immunity. The bank

maintained that the firewall separating the construction area from the temporary bank facility reached all the way to the ceiling, and not partway as the employees testified. The bank argued that it prepared its plans using qualified design professionals and pulled the appropriate building permits. The bank denied that any of the air from the construction area entered the bank's temporary facility. The bank argued that it responded properly to the employee complaints and that as of December 2002, interior air testing revealed that the air quality in the building was within a normal range.

In opposition, the plaintiff relied on employee testimony outlined earlier in this opinion. The plaintiff also filed an affidavit of plaintiff's environmental medical expert, Dr. Albert F. Robbins:

> 3. I have reviewed the Material Safety Data Sheets of products that were used in this deficiently ventilated structure where they worked.
>
> 4. I have been informed that they were exposed to daily, multiple hour exposures of concrete particulates, including silicas, various construction fibers, mold spores and volatile organic chemicals, for which I have reviewed the Material Safety Data Sheets.
>
> 5. The Material Safety Data Sheets on these products and my own knowledge and experience with the other compounds

through my environmental medicine

practice show these compounds to be quite hazardous individually, and substantially more hazardous when inhaled in combination.

6. This environment in the work place was virtually certain to cause injury to the Plaintiffs, Marlene Barnett, Gary Bullard, Oswaldo Membreno, Michelle Morgan, Daisy Herrera, Anateresa Vargas, Lucrecia Vargas and Marek Wojcik.

The trial court granted the bank's motion for summary judgment, and the plaintiff has appealed.

The plaintiff sustained her injuries in the course and scope of her employment. Ordinarily workers' compensation provides the exclusive remedy foran employee for such injuries, and the employer is immune from suit. See Turner v. PCR, Inc., 754 So. 2d 683, 686 (Fla. 2000). There is, however, an intentional tort exception to workers' compensation immunity. Id. The intentional tort exception is applicable where the employer is "shown to have either 'exhibite[d] a deliberate intent to injure *or* engage[d] in conduct which is substantially certain to result in injury or death.'" Id. at 687.[2]

In this case the plaintiff relies on the second alternative. She alleges that the employer engaged in conduct which was substantially

certain to result in injury or death. This is measured by an objective standard. Turner, 754 So. 2d at 688. The

question is "whether a reasonable person would understand that the employer's conduct was 'substantially certain' to result in injury or death to the employee. Under this approach, the employer's actual intent is not controlling." Id. These principles have been reiterated in Bakerman v. The Bombay Co., 961 So. 2d at 262-65.

This is a motion for summary judgment on which we read the factual record in the light most favorable to the plaintiff as the nonmoving party. When the record is read in that light, it is clear that there are disputed issues of material fact regarding the substantial certainty test. To begin with, the bank asserts that there was a firewall which completely separated the temporary bank premises from the construction area so that no dust or fumes could enter the temporary bank quarters. But that is a disputed fact. The testimony of several bank employees states that the partition wall did not reach all the way to the ceiling and was open at the top. The bank itself acknowledges that it provided additional cleaning staff and other devices to correct the additional dust that was entering the premises—a concession which seems to acknowledge that there was no complete separation between the construction area and the

temporary bank quarters. The bank also acknowledges that it installed fans, coolers, and air purifiers in November 2002 which actions are, again, inconsistent with its denial that there was any problem created by the ongoing construction.

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Based on the applicable cases, the summary judgment should not have been granted. In Fisher v. Shenandoah General Construction Co., 498 So. 2d 882, 883 (Fla. 1986), receded from in part, Turner v. PCR, Inc., 754 So. 2d at 691 n.8, the plaintiff alleged that the employer required the decedent to enter pipes which it knew contained noxious fumes and which would "in all probability" cause injury or death. The complaint alleged that the employer had failed to provide its workers with oxygen masks and other appropriate safety equipment. As originally announced in 1986, the Supreme Court held that these allegations did not satisfy the substantial certainty standard, Fisher, 498 So. 2d at 883, but in 2000 in Turner, the Supreme Court modified Fisher and stated that the Fisher facts constituted "a sufficient basis to support an allegation of substantial certainty of injury." Turner, 754 So. 2d at 691 n.8. Thus, requiring an employee to work in an area containing harmful noxious fumes, without providing adequate safety equipment, satisfies the substantial certainty standard.

In Turner, the employer was conducting research

on air conditioning coolants. A supplier of the chemical tetrafluoroethylene (TFE) advised the employer that it was going to discontinue supplying TFE because of its hazardous character. Id. at 685. The employer continued to use the product in its testing, and according to expert testimony, did so using equipment which was fundamentally unsafe. The Court held that these facts created a disputed issue of material fact on

whether the employer's conduct created a substantial certainty of injury, and ruled that the summary judgment in favor of the employer must be reversed. Id. at 691.

In Cunningham v. Anchor Hocking Corp., 558 So. 2d 93 (Fla. 1st DCA 1990), the plaintiffs alleged that they sustained injuries from inhaling toxic fumes at a manufacturing plant where they were not provided adequate safety equipment. They contended that the employer "diverted the smokestack so that fumes would flow into, rather than outside of, the plant, and that they periodically turned off the plant ventilation system, thereby intensifying the level of exposure." Id. at 96. The plaintiff also alleged that the employer "removed manufacturers' warning labels on toxic substance containers, misrepresented the toxic nature of substances, and knowingly provided inadequate safety equipment, while misrepresenting the danger or extent of the toxicity in the plant and the need for

proper safety equipment " Id. at 96-97. The First District held that the substantial certainty standard was met and reversed the order dismissing the complaint.

It bears emphasis that the substantial certainty standard applies where there is substantial certainty of **either** injury **or** death. Turner, 754 So. 2d at 687 (emphasis added). Thus the substantial certainty test has been applied in cases involving a non-fatal injury, Cunningham; Bakerman, 961 So. 2d at 259) (ankle injury), as well as cases involving fatalities. Fisher; Turner.

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The bank relies on McClanahan v. State, 854 So. 2d 793 (Fla. 2d DCA 2003). In that case the plaintiffs were employees of the Florida Department of Juvenile Justice. They worked in a juvenile detention center which had been built in the early 1990s. They alleged that there had been negligence in the design and construction of the building such that it was contaminated by excessive levels of moisture, mildew, and mold. Id. at 794. The plaintiffs alleged respiratory injuries and the wrongful death of a deceased employee. The exact nature of the contamination and extent of risk were not spelled out in the opinion. The Second District concluded that the allegations amounted to claims of negligent conduct and that the substantial certainty test had not been met.

The present case differs significantly. The claim here is that the temporary work space was not

properly separated from the construction area and that the employees were, in effect, being required to work in the middle of a construction project. They alleged continuous exposure to dust and other particles as well as noxious fumes. This persisted from May or June 2002 to January 2003 when the employees were finally allowed to relocate to an alternate space. The factual circumstances here are better documented, including a medical expert affidavit, and are entirely distinguishable from those in McClanahan. The circumstances present here bear a greater resemblance to Fisher, Turner, and Cunningham than to McClanahan.

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The bank relies on Pendergrass v. R.D. Michaels, Inc., 936 So. 2d 684 (Fla. 4th DCA 2006). The Pendergrass case involved the collapse of a wall at a construction site where the affidavit of the plaintiff's expert only stated that the employer had been negligent and did not address the substantial certainty standard. Id. at 693.[2]

The bank relies on Bourassa v. Busch Entertainment Corp., 929 So. 2d 552 (Fla. 2d DCA 2006), but that case is not helpful to the bank. The plaintiff was an animal trainer at Busch Gardens. She conducted a simulated blood draw from a full grown lion. There was a procedure which, "[w]hen performed correctly, the procedure did not allow for any part of Max's [the lion's] mouth to come into contact with any

part of the keeper's body." Id. at 555. However, on the day of the incident, the lion was able to grab the plaintiff's fingers, resulting in a struggle in which the plaintiff's arm was severed at the elbow. The Second District upheld the workers' compensation immunity, based on the fact that Busch Gardens had a

training program in place which was believed to be adequate to address the risk of working with the lion.[4]

The bank relies on Wilks v. Boston Whaler, Inc., 691 So. 2d 629 (Fla. 5th DCA 1997), which involved a respiratory injury. The Wilks case was decided in 1997 and was based squarely on the Supreme Court's decision in Fisher. The Florida Supreme Court receded from Fisher in 2000. Turner. The legal basis of Wilks has been undermined.

The bank also maintains that the expert affidavit of Dr. Robbins was legally insufficient. The objection in the trial court was that the affidavit was lacking in personal knowledge and did not attach the documents to which the doctor referred. The legal authority cited by the bank was CSX Transportation, Inc. v. Pasco County, 660 So. 2d 757, 759 (Fla. 2d DCA 1995). That case involved affidavits submitted by fact witnesses trying to establish whether construction had begun on a railroad crossing as of a particular date. The affidavit in this case is the affidavit of an expert witness. The bank has

not provided any authority for the proposition that the affidavit is insufficient as the affidavit of an expert witness.

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For the stated reasons, there are disputed issues of material fact and summary judgment should not have been granted. We reverse the summary judgment and remand for further proceedings.